

# Memorandum in Support of Petition for a Rule Change

## INTRODUCTION

Qwest Corporation ("Qwest") hereby petitions the Utah State Tax Commission (the "Commission") to exercise its rulemaking power pursuant to Utah Admin. Code R861-1A.2.G and adopt a proposed amendment to Utah Admin. Code R884-24P-62 ("Rule 62") which amendment is described below and is attached hereto as Exhibit A. Qwest has a direct stake in the Commission's consideration of the proposed amendment and will be directly affected by the amendment inasmuch as it currently experiences economic disadvantage as a result of inequitable property tax treatment. This amendment also has substantial value to citizens of this state because it would provide more uniform treatment of similarly situated taxpayers.

## PROPOSED AMENDMENT

The Commission is authorized by statute to centrally assess "all property that operates as a unit across county lines" and "all property of public utilities." Utah Code Ann. §§ 59-2-201(1)(a) and (b). Traditionally, this statute has been interpreted to require the central assessment of telecommunications properties because such properties typically operate as a network with other properties to facilitate communication between a caller and a recipient who may be located in different counties or states.

In Rule 62 the Commission has defined the "telecommunications properties" that are subject to central assessment as follows:

"Telecommunication properties" include the operating property of local exchange carriers, local access providers, long distance carriers, cellular telephone or personal communication service (PCS) providers and pagers, and *other similar properties*.

See Utah Admin. Code R865-24P-62.4.b.1 (emphasis added). Although, cable companies are not expressly identified in Rule 62 as a telecommunications property, they should be considered as such under the phrase “other similar properties.”

Over a decade ago, the Commission conducted a preliminary review of one cable company to see if cable companies should be subject to central assessment. At that time, cable companies were largely viewed as television providers that offered one-way communication, television programming. At that time, it was rare for cable lines to cross county lines or interact with other telecommunications-type properties in other counties or states.

Cable operations, however, have changed dramatically since the early 1990s. Cable companies now offer a broad array of telecommunications services that allow their customers to engage in two-way communications throughout the country and the world. In order to offer these telecommunications services, the cable companies’ properties necessarily interconnect with other properties to operate as a network across county and state lines.

The telecommunications services offered by cable companies are in direct competition with the entities expressly identified in Rule 62. For example, the cable company, Comcast provides voice and data telephone services and Internet services that are in direct competition with Qwest in Utah and other markets. On its web page, Comcast boasts of being able to provide big savings “over your local phone company.” See [www.comcast.com](http://www.comcast.com). and Exhibit B attached hereto. Comcast also states that it “provides unlimited nationwide direct-dial calling,” three-way calling, call screening, call forwarding, speed dial, Internet services, and call waiting. *Id.* Comcast also states that it can provide its services over the customer’s existing phones and can maintain the current phone number used by that customer. *Id.* It is readily apparent that cable

companies such as Comcast are in direct competition with telephone corporations in providing telecommunications services. The fact that competing entities which facilitate two-way communication are not similarly assessed inevitably results in disparity. *See e.g. Beaver County v. WilTel, Inc.*, 2000 UT 29 ¶ 4, 995 P.2d 602, 604 (2000)(Property Tax Division argued cost approach used in local assessments “would undervalue WilTel’s property, and that this departure from fair market value would discriminate against similarly situated centrally assessed taxpayers such as AT&T, MCI, and Sprint.”).

The property of cable companies clearly falls under the central assessment provision of Utah Code Ann. §§ 59-2-201(1)(a) and (b), and Rule 62 should be amended to expressly clarify and identify cable companies as a centrally assessed telecommunications property. The amendment proposed by Qwest would clarify the rule’s requirement that *all* property which “operates as a unit across county lines” is subject to central assessment. To that end, Qwest proposes that Rule 62 be amended as follows to clarify that cable companies are “telecommunications properties” subject to central assessment:

“Telecommunication properties” include the operating property of local exchange carriers, local access providers, long distance carriers, cellular telephone or personal communication service (PCS) providers, ~~and~~ pagers, cable companies, and other similar properties which are utilized to facilitate two-way communication.

## ANALYSIS

### **I. THE PROPOSED CLARIFICATION OF RULE 62 WILL RESTORE FAIRNESS AND EQUITY AMONG COMPETING TAXPAYERS AND WILL RESULT IN A PREDICTABLE AND EQUITABLE TAX BASE.**

Rule 62 requires the central assessment of all “telecommunication properties.” However, the current version of Rule 62 does not list cable companies among the examples of

“telecommunications properties.” Consequently, certain taxpayers that are classified as “public utilities” are centrally assessed on the properties providing phone and Internet services while other competing entities which are not classified as public utilities are locally assessed.

Central assessment of public utilities which provide Internet services appears to be based on the definition in Rule 62 of “unitary property” as including “*all* property of public utilities as defined in 59-2-102.” Utah Admin. Code R884-24P-62.4.a.2. Section 59-2-102 incorporates by reference the definition of public utilities contained in Section 54-2-1, which defines public utilities to include a “telephone corporation.” The same statute defines “telephone corporation” as “any corporation or person, and their lessees, trustee, receivers, or trustees appointed by any court, who owns, controls, operates, manages, or resells a public telecommunications service as defined in Section 54-8b-2.”<sup>1</sup> Section 54-8b-2(16) defines “Public telecommunications service” to mean “the *two-way transmission* of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, or other electromagnetic means offered to the public generally.” Utah Code Ann. § 54-8b-2(16)(emphasis added).

Because central assessment is a unitary assessment, the value of the property which is centrally assessed includes intangible values resulting from the operation of all tangible, taxable property as a unit. *Adams Express Co. v. Ohio*, 165 U.S. 194, 220-221 (1897). The assets of a telecommunications company which are centrally assessed are often valued at a higher rate than

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<sup>1</sup> The statute excludes from the definition of “telephone corporation”:

- (i) intrastate telephone service offered by a provider of cellular, personal communication systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. Sec. 332 that has been issued a covering license by the Federal Communications Commission;
- (ii) Internet service; or
- (iii) resold intrastate toll service.

Utah Code Ann. § 54-2-1(23)(b).

the assets belonging to a similar enterprise which operates independently of a public utility.<sup>2</sup>

This results in inequality and unfairness inasmuch as assets performing essentially the same function are taxed at entirely different rates. *See e.g. Beaver County v. WilTel, Inc.*, 2000 UT 29 ¶ 4, 995 P.2d 602, 604 (2000).

In contrast, local assessment is predicated on the ability of the property located within each county to function independently. Therefore, the value of the locally assessed property is calculated based solely on the value of the assets located within that county, without regard to enhanced value resulting from the property's possible interconnection to or integration with assets outside of the county which conducts the assessment. Furthermore, because each county conducts its own independent assessment, there is the added risk that the valuation from county to county will be inconsistent.

Assets belonging to cable companies which provide voice and Internet services, but are not owned, controlled, operated or managed by a public utility, are typically locally assessed. This appears to be a result of the failure of Rule 62 to include "cable companies" within the definition of "telecommunications entities." The clarification of the rule to include these entities is consistent with the types of entities already listed within the definition. Furthermore, it is clear

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<sup>2</sup> This principle was explained by the United State Supreme Court in *Adams Express Co. v. Ohio*, 165 U.S. 194, 220-221 (1897):

As to railroad, telegraph and sleeping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several States through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State . . . . The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company . . . but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation.

that the list of examples provided within the rule is not intended to be exhaustive as evidenced by the inclusion of the phrase “and other similar properties.”

The amendment proposed by Qwest does not represent a departure from the current version of Rule 62, but rather a clarification of the rule’s reference to “telecommunications properties.” The identification of cable companies as “telecommunication” companies is consistent with other definitions of “telecommunications systems” contained in Utah law. For example, Utah law already defines “public telecommunications service” within the Public Telecommunications Law as the “*two-way transmission* of signs, signals, writing, images, sounds, messages, data, or other information of any nature by **wire**, radio, lightwaves, or other electromagnetic means offered to the public generally.” Utah Code Ann. § 54-8b-2(16)(emphasis added).

## **II. THE PROPOSED AMENDMENT IS CONSISTENT WITH THE UTAH SUPREME COURT’S DETERMINATION OF THE KIND OF PROPERTY WHICH IS SUBJECT TO CENTRAL ASSESSMENT.**

In *Beaver County v. WilTel, Inc.*, the Utah Supreme Court determined that property belonging to a long-distance telecommunications service provider was subject to central assessment because the company operated as a unit across county lines. WilTel challenged the applicable statute on the basis that many enterprises, such as “banks, and a retail furniture chain, and also cable companies, Internet service providers, and telecommunication resellers” operate in multiple counties but are all locally assessed. The Court contrasted WilTel to “a bank or retail outlet whose branch stores have value and in some cases could operate independently.” *Id.* at ¶19. It is significant that the Court did not include within its list of entities which have independent value and operation, the cable companies, Internet service providers and

telecommunication resellers referred to by WilTel. The Court observed that, unlike banks or retail outlets, WilTel “exhibited complete physical, economic, and functional integration” and that its “value and mode of operation are entirely as a unit across county lines.” *Id.*

The Court went on to explain that “central assessment is the most rational way to determine the value of an enterprise whose function relies upon cross-boundary connections.” *Id.* at ¶ 21. The Court concluded that central assessment bore a rational relationship to “the legitimate state purpose of assuring that each property is ‘accountable for its pro rata share of the burden of local government.’” *Id.* at ¶ 22 quoting *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 192 (Utah 1984).

Even though cable companies have, traditionally, been locally assessed, the Court’s analysis in *WilTel* supports the conclusion that cable companies should actually be subject to central assessment. The *WilTel* Court explained that banks and retail outlets have independent value as well as the ability to operate independently. The Court contrasted this independence with WilTel’s dependence on “the network of microwave and fiberoptic cable that connects across county and even state lines to carry messages for its customers.” *Id.* at ¶ 19. Like WilTel, cable companies depend on microwave equipment and/or fiberoptic cable to facilitate two-way communication across state and county lines. For example, cable companies operate by means of coaxial and fiberoptic cable lines which bring television, voice and data signals into a home. Cable companies use these cables to transmit voice and Internet communications at different frequencies than the television signal. Because the information is transmitted by means of cables, the cables located in a single county would not be operational without some connection to the counties where the voice or Internet signals originate or terminate.

The *WilTel* Court explained that the value of WilTel “depends on the interrelation and operation of the entire utility as a unit” and that separate, intra-county assets would be “practically valueless without the rest of the system.” *Id.* at ¶ 35. Likewise, the intra-county assets belonging to cable companies would be “practically valueless” without the equipment that “carr[ies] messages for [their] customers” and is, therefore, essential to “the interrelation and operation of the entire [enterprise].” *Id.* at ¶¶ 19 and 35. *See also* Tax Commission Order in Appeal No. 02-1010 (June 16, 2003) (Commission authorized central assessment of cellular properties as operating across county lines because they interconnect with other telecommunications properties in other counties to complete calls).

The proposed amendment to Rule 62 carefully applies the observations and findings by the *WilTel* Court. It also does not expand the definition of “telecommunication properties” beyond what appears to be the intended scope of the rule. The rule concedes that “unitary properties” includes more than public utilities and uses the term “other similar properties” to extend central assessment beyond just the property belonging to the telecommunications properties specifically listed in the rule. The characterization of cable companies as telecommunications entities is also entirely consistent with other definitions of “telecommunications” found in Utah law.

### **CONCLUSION**

Because Qwest currently provides phone and Internet services and its properties which are used to provide such services are centrally assessed, Qwest has a significant stake in the Commission’s consideration of the proposed amendment as a means to rectify the inequality



resulting from the current system of taxation. Correcting this inequality by means of the proposed amendment to Rule 62 is also in the best interest of the citizens of this state.

By amending Rule 62 to promote fairness and equity among similarly situated taxpayers, the Commission ensures that the assessments for similarly situated entities will be based on fair market value. The proposed amendment is essential to achieving an equitable and predictable tax base.

Qwest respectfully requests that this Commission exercise its rulemaking power and either (1) provide notice of its intent to exercise its rulemaking power to amend Rule 62 (Utah Admin. Code R.861-1A-2.C), or (2) adopt and publish the proposed rule as permitted under Utah Admin. Code R861-1A-2.D and F.

## EXHIBIT A

### PROPOSED RULE

“Telecommunication properties” include the operating property of local exchange carriers, local access providers, long distance carriers, cellular telephone or personal communication service (PCS) providers, ~~and~~ pagers, cable companies, and other similar properties which are utilized to facilitate two-way communication.

Utah Admin. Code R865-24P-62.4.b.1.

**EXHIBIT B**

**COMCAST WEBSITE ADVERTISEMENTS  
FOR TELECOMMUNICATION SERVICES**

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### Preferred Savings

What's cooler than getting everything you want in a home phone service? Saving big over the phone company. And with Comcast Digital Voice that's exactly what you'll do. So drop your big phone bill and pick up Comcast Digital Voice. You'll save big over your local phone company every month!\* Already a Comcast High-Speed Internet and/or Cable customer? Bundle your Comcast services and save even more!



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Not available in all areas. Certain restrictions apply. Price does not include applicable taxes and fees. Price comparison is based on the incumbent local phone company's similar package including Unlimited as described on website as of 5/4/06. Unlimited Package pricing applies to direct-dialed domestic calls from home. Pricing does not include federal, state, or local taxes; our Regulatory Recovery Fee, which is not a tax or government-required; or other applicable charges (e.g., per-call charges or international calling).

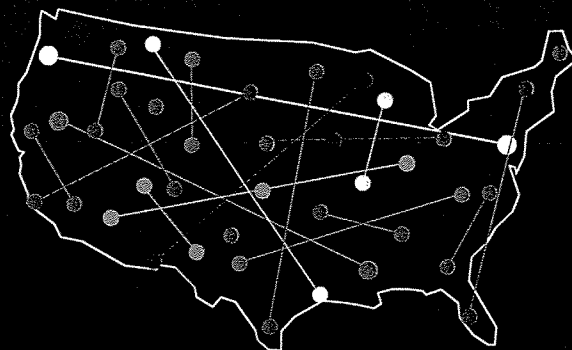
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## Savings & Simplicity

### Unlimited Calling

Never worry about running up your phone bill again. Comcast Digital Voice provides unlimited nationwide direct-dial calling from your home and includes calls to Canada, Puerto Rico, US Virgin Islands, Guam, and Saipan/N. Mariana Islands. So call after call after call, you always get a great deal.



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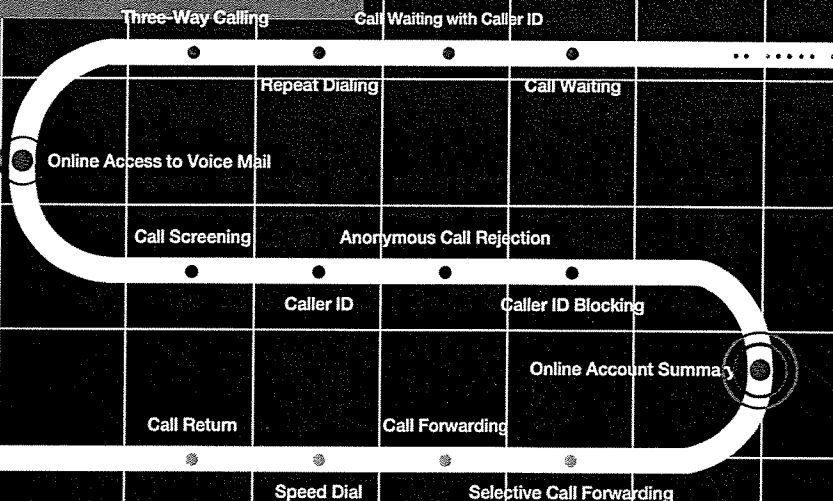
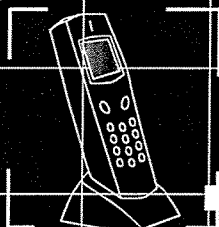
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## Loaded With Features

### All You'd Expect and More

Comcast Digital Voice takes your home phone service to a whole new level. It gives you the latest advances in phone technology plus all the features you've come to rely on, like Caller ID and Voice Mail. We give you the tools to supercharge your home phone service.



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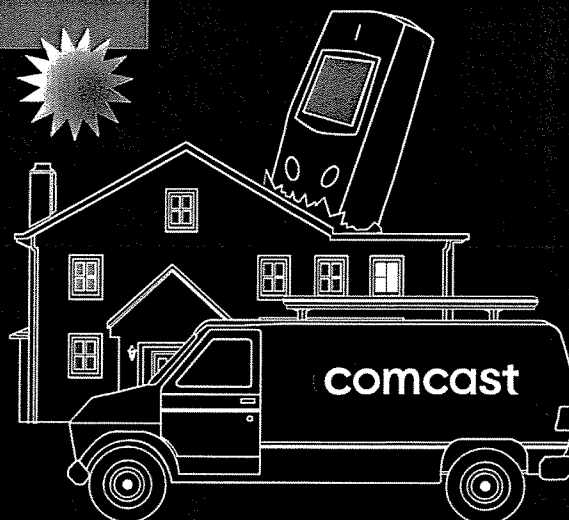
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Free installation not available in all areas.



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### Equipment Compatibility Disclaimer

Certain customer premises equipment may not be compatible with Comcast Digital Voice services.

Free installation not available in all areas.

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